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MEMORANDUM TO: Faryar Shirzad
Assistant Secretary
for Import Administration

FROM: Bernard T. Carreau
Deputy Assistant Secretary
for AD/CVD Enforcement II

SUBJECT: Issues and Decision Memorandum for the Final Results of the
Antidumping Duty Administrative Review: Carbon Steel Butt-Weld
Pipe Fittings from Thailand (2000/2001 Administrative Review)

Summary

We have analyzed the case briefs and the rebuttal briefs of the interested parties. As a result of our analysis, we have made changes to our preliminary results of review. We recommend that you approve the positions we have developed in the “**Department Position**” sections of this memorandum. Below is a complete list of the issues in this administrative review for which we have received comments and rebuttal comments from interested parties.

Thai Benkan Company, Ltd. (TBC)

1. Application of Adverse Facts Available
2. Indirect Selling Expense Ratio
3. Constructed Export Price (CEP) Profit Ratio

Background

On August 7, 2002, the Department of Commerce (the Department) published the preliminary results of the administrative review of the antidumping (AD) order on carbon steel butt-weld pipe fittings from Thailand. See Certain Carbon Steel Butt-Weld Pipe Fittings from Thailand: Preliminary Results of Antidumping Duty Administrative Review, 67 FR 51178 (August 7, 2002) (Preliminary Results). The period of review (POR) is July 1, 2000 through June 30, 2001. The respondent is TBC. We conducted verification of the information submitted by TBC and issued a report on December 9, 2002. We invited parties to comment on our preliminary results of review. On December 20, 2002, we received case brief from TBC (TBC Case Brief). On January 3, 2003, we received rebuttal comments from Tube Forgings of America, Inc. (Petitioner Rebuttal Brief).

DISCUSSION OF THE ISSUES

Comment 1: Application of Adverse Facts Available

TBC argues that despite the omissions in the home market data set, the Department should not to apply adverse facts available to any aspect of the final results because it “cooperated to the best of its ability” throughout the course of this administrative review. See TBC Case Brief, at 2-3. TBC also claims that under the prevailing case law, the Department may not apply adverse inferences unless a respondent had the ability to comply, and its failure to do so was the result of something more than simple inadvertence. Id.

According to TBC, given its difficult financial situation due to the bankruptcy, it had limited resources to use in preparation of the Department’s questionnaire responses. Despite these difficulties, TBC claims that it responded to the best of its ability to all requests for information. Although, by its own admission, TBC was not able to explain to the verifiers what precisely caused omissions in its home market data, it argues that said omissions were inadvertent in nature. Further, TBC argues that once it realized that the reported quantities were not reconcilable to its financial statements, it prepared a new and corrected home market data set and presented that data set at the outset of verification as a “minor correction.” See TBC Case Brief, at 9.

Additionally, citing to the Statement of Administrative Action (SAA), TBC claims that one of the factors the Department considers in determining whether to apply adverse facts available is that “a party may benefit from its lack of cooperation.” See TBC Case Brief, at 6. TBC argues that there is no evidence to show any motivation on the part of the company to submit erroneous information. Id. To support this argument, TBC points to certain incorrect dates of sale which actually hurt the company in price comparison. TBC claims that the incorrect dates of sale effectively removed the appropriate models from the 90/60 window of contemporaneous sales thus generating dumping margins while the correct dates would have resulted in no margins.

In sum, TBC urges the Department to continue to rely on non-adverse partial facts available to fill in gaps for purposes of the final determination. TBC believes that the Department is required to use the submitted information as TBC has satisfied all five criteria specified in section 782(e), *i.e.*, the information was timely submitted, the information can be verified (emphasis added), the information is not so incomplete that it cannot serve as a reliable basis for determination, TBC acted to the best of its ability in supplying information, and the information can be used without undue difficulties.

In its rebuttal, petitioner argues that since the Department was not able to reconcile TBC's total home market quantity and the resulting home market value to its financial statements, the home market sales database could not be considered a reliable database. As such, the petitioner claims, there are no normal values against which TBC's U.S. prices can be compared. See Petitioner Rebuttal Brief, at 1. Petitioner further states that TBC had sufficient time to prepare verifiable questionnaire responses as indicated by a number of lengthy extensions granted to TBC by the Department thus, leaving the Department with no choice but to resort to total facts available in the final results of the instant review.

Additionally, the petitioner argues that TBC's description of the unreconcilable home market database as a mere "data processing error" is, in fact, a failure to meet the most fundamental element of verification. See Petitioner Rebuttal Brief, at 3. The absence of reconciliation of quantity and value to financial statements indicates, according to the petitioner, that the Department has no ability to rely on "any" element of the home market data. *Id.* Similarly, the petitioner claims that the fact that the U.S. market sales could be verified does not render the home market sales reliable (emphasis added).

The petitioner also states that the Department has authority to assign a dumping margin using adverse inferences because of: (1) an inability to verify submitted data; and (2) respondent's failure to cooperate by not acting to the best of its ability. See Petitioner Rebuttal Brief, at 5. According to the petitioner, the inability to verify is clearly established in the verification report.

With regard to respondent's failure to cooperate, the petitioner claims that there are several factors that may be considered, *e.g.*, whether the respondent could comply with a request for data, whether there was a willful decision not to comply, or whether there was behavior below the standard expected of a reasonable respondent. *Id.* Petitioner argues that TBC was able to provide reliable data as proven by the submission of the corrected data set at verification. Additionally, the petitioner argues, TBC was offered ample amount of time (TBC requested a postponement of the preliminary results and the verification) to prepare a verifiable data base. Furthermore, according to the petitioner, TBC does have past experience with the U.S. AD law. The petitioner notes that TBC refused to participate in the investigation and was assigned a margin based on best information available. In the subsequent administrative review, TBC submitted data which were successfully verified. Thus, according to the petitioner, while TBC does not always choose to cooperate with the Department, it is apparent that it has the capability and experience to provide verifiable data when it does choose to cooperate.

The petitioner concludes that, given the circumstances, TBC could submit verifiable data and

that it failed the standard of a reasonable respondent. As such, the petitioner is urging the Department to consider adverse inferences not only with regard to the respondent's behavior in the instant review but also with regard to its past history of selective non-cooperation. The petitioner is asking the Department to apply the dumping margin of 50.84 percent, the margin TBC received in the LTFV investigation.

Department's Position:

We agree with the petitioner. In accordance with section 782(i) of the Act, during the week October 28 through November 1, 2002, the Department conducted verification of TBC's sales responses. See Verification of the Sales Questionnaire Responses of Thai Benkan Corp., and Benkan America, Inc.,—Carbon Steel Butt-Weld Pipe Fittings from Thailand- Administrative Review (2000-2001) Memorandum from Tom Futtner Program Manager to the File, dated December 9, 2002, (Verification Report), at 2. At verification, TBC revealed, for the first time, that it noticed significant discrepancies between quantities reported to the Department and the quantities that were actually shipped in the home market. See Verification Report, at 5. The extent of the errors was such that the company was not able to reconcile the total quantity, and the resulting total value, to its financial statements. Id. Although TBC attempted to determine what caused this discrepancy, it was unable to reach a definitive conclusion. The company speculated that the reason for the differences between the quantities reported to the Department and the actual quantities shipped during the POR were due to errors in data processing. However, TBC was not able to document this conclusion. Id. The verification team randomly selected ten transactions from the reported home market data set, and traced their respective quantities to the source documents (*i.e.*, purchase orders and sales invoices). We noted that in 50 percent of the sample, the actual quantities sold were significantly different than those reported to the Department. Additionally, our examination of dates of sale, shipment and payment indicates that in over 50 percent of the randomly selected transactions, reported dates frequently differed from the actual dates by a number of months. See Verification Report, Exhibits 6. At verification, TBC prepared a new and, allegedly, corrected data set and suggested to the Department that it should accept it as a minor correction. The Department officials refused to consider this a minor correction and did not accept the new data set. See Verification Report, at 5. For additional details, see also Verification Report Exhibits 8, 10, 11 and 12.

Section 776(a)(2) of the Act provides that “if an interested party or other person--(A) withholds information that has been requested by the Department, (B) fails to provide such information by the deadlines for submission of the information or in the form and manner requested, (C) significantly impedes a proceeding, or (D) provides such information but the information cannot be verified as provided in section 782(i), the Department shall, subject to section 782(d), use the facts otherwise available in reaching the applicable determination.”

Section 782(d) provides that if the Department determines that a response to a request for information does not comply with the request, the Department shall inform the person submitting the

response of the nature of the deficiency and shall, to the extent practicable, provide the person with an opportunity to remedy or explain the deficiency in light of the time limits established for completion of investigations or reviews under this title. Section 782(e) further provides that the Department shall not decline to consider information that is submitted by an interested party and is necessary to the determination but does not meet all the applicable requirements established by the Department if: (1) the information is submitted by the deadline established for its submission; (2) the information can be verified; (3) the information is not so incomplete that it cannot serve as a reliable basis for reaching the applicable determination; (4) the interested party has demonstrated that it acted to the best of its ability in providing the information and meeting the requirements established by the Department with respect to the information; and (5) the information can be used without undue difficulties.

In accordance with section 782(d), the Department provided TBC with ample opportunity to correct the defects in its home market sales response. On September 13, 2001, the Department sent a questionnaire to TBC requesting, *inter alia*, that it provide a home market sales listing (*i.e.*, Section B). The response was due to the Department on October 26, 2001. On October 9, 2001, TBC requested an extension of time to complete Section B, which was granted. The new deadline for Section B was November 16, 2001. On October 26, 2001, TBC requested an additional extension of time citing, among others factors, financial difficulties. The Department again granted an extension of two additional weeks resulting in a due date of November 30, 2001. See, Letters from Program Manager Tom Futtner to Yoshihiro Saito, counsel to TBC, dated October 10 , and November 13, 2001, respectively. On February 12, 2002, the Department issued a supplemental questionnaire for Section B, enumerating a substantial list of deficiencies including, but not limited to, missing dates of sales and payments, unexplained variations in quantity between the sales and purchase order and incomplete variable cost and constructed value (CV) information. See Supplemental Questionnaire for Sections A through C for Thai Benkan Co., Ltd. In response to the Department's supplemental questionnaire, TBC requested a postponement for issuing preliminary results and a 60 days extension for the supplemental questionnaire. In light of TBC's ongoing financial problems, the Department granted both requests. See Letters from Yoshihiro Saito to the Secretary of Commerce, dated February 13 and 14, 2002, respectively.

As the record of this case indicates, the Department provided TBC with ample opportunity to prepare a correct and verifiable home market data set. Yet, despite numerous opportunities to provide the Department with a correct home market data set, the Department verified that TBC's information was flawed. TBC's failure to provide the Department with the requested sales information constitutes a withholding of information within the meaning of section 776(a)(2)(A) of the Act. It has also failed to provide verifiable information within the meaning of section 776(a)(2)(D) of the Act.

We must consider whether the submitted sales data is usable under section 782(e) of the Act. When examined in light of the requirements of section 782(e), the facts of this case indicate that TBC's home market sales data is so fundamentally flawed as to render it unusable. The reported home market sales contained significantly different quantities, incorrect dates of sale, and incorrect shipment and

payments dates. Because the discovery of flawed data occurred only at verification (and, therefore, would have remained undiscovered were it not for the Department's decision to verify TBC's response), this information was not provided to the Department by the deadlines established for its submissions, as required by section 782(e)(1). Additionally, the Department was unable to verify this information, as required by subsection (e)(2). It is a central tenet of Departmental practice that verification is not intended to be an opportunity for submitting new factual information. See Elemental Sulphur From Canada: Preliminary Results of Antidumping Duty Administrative Review, 62 FR 970 (January 7, 1997). The Department also stated in its verification outline that new information will be accepted at verification only when: (1) the information makes minor corrections to information already on the record, (2) the information corroborates, supports, or clarifies information already on the record, and (3) the new information or revisions to previously submitted information would not substantially alter some or all of the questionnaire responses. See Letter to TBC: Verification of the Sales Questionnaire Responses of Thai Benkan Corp., and Benkan America, Inc.-- Carbon Steel Butt-Weld Pipe Fittings from Thailand – Administrative Review (2000-2001) (October 15, 2002). The discovery of what amounts to a brand new data set meets none of these qualifications. As such, the Department could not verify this information.

We also find the information which TBC supplied in its responses to be so incomplete that it cannot serve as a reliable basis for reaching the applicable determination, as required by subsection (e)(3). Insofar as the Department only makes price-to-price comparisons (normal value to CEP), the flawed nature of the home market data makes these comparisons impossible. In the absence of home market sales data, the Department would normally resort to the use of constructed value as normal value. However, as noted in the preliminary results, the constructed value information reported by TBC was determined to be unreliable: "...TBC did not provide reliable differences-in-merchandise or CV data. As a result, the Department's analysis was limited to those TBC's U.S. sales which could be compared to sales of identical merchandise in the home market." See Preliminary Results, at 51179.

The Department's prior practice has been to reject a respondent's submitted information *in toto* when flawed and unreliable cost data renders any price-to-price comparison impossible. See Notice of Final Determination of Sales at Less Than Fair Value: Certain Cold-Rolled Carbon Steel Flat Products From Venezuela, (Flat Products from Venezuela) 67 FR 62119 (October 3, 2002), Notice of Final Determination of Sales at Less Than Fair Value: Certain Pasta from Italy, 61 FR 30326, 30329 (June 14, 1996); Notice of Final Determination of Sales at Less Than Fair Value: Certain Pasta from Turkey, 61 FR 30309, 30311 (June 14, 1996). The rationale for this policy is contained in Notice of Final Determination of Sales at Less than Fair Value: Grain Oriented Electrical Steel From Italy, 59 FR 33952, 33594 (July 1, 1994), where the respondent failed the cost verification. In that case, the Department explained that the rejection of a respondent's questionnaire response *in toto* is appropriate and consistent with past practice in instances where a respondent failed to provide verifiable cost of production (COP) information: "[I]f the Department were to accept verified sales information when a respondent's cost information (a substantial part of the response) does not verify, respondents would be in a position to manipulate margin calculations by permitting the Department to verify only that

information which the respondent wishes the Department to use in its margin calculation.” This situation applies to the instant review where TBC provided U.S. sales data in a proper form, but did not provide verifiable home market data nor reliable CV information. It is the Department's practice to regard verified sales information as unusable when the price-to-price comparisons are rendered impossible. The Department has reiterated this position in its Notice of Preliminary Results of Antidumping Administrative Review: Cut-to-Length Carbon Steel Plate from Sweden, 61 FR 51898, 51900 (October 4, 1996), and in Flat Products from Venezuela.

In addition, we find that TBC has not demonstrated that it acted to the best of its ability in providing the information and meeting the requirements established by the Department in this review. As noted above, despite many extensions of time, and the postponement of the preliminary results and the verification, TBC failed to provide complete and accurate data. Therefore, we find that section 782(e)(4) of the Act provides a further basis for declining to consider TBC's information. Accordingly, we find that there is no reasonable basis for determining normal value for TBC in this review. As a result, we could not use TBC's U.S. sales data in determining a dumping margin, in accordance with section 782 (e)(5). Thus, the Department must resort to a total facts available methodology.

Section 776(b) provides that adverse inferences may be used in selecting from the fact otherwise available if the Department finds that an interested party has failed to cooperate by not acting to the best of its ability to comply with requests for information. We have determined that TBC did not act to the best of its ability to comply with our requests for information. In light of the above, and in accordance with section 776(b) of the Act, we have applied an adverse inference in selecting TBC's margin.

Section 776(b) authorizes the Department to use as adverse facts available information derived from the petition, the final determination, a previous administrative review, or any other information placed on the record. The SAA provides that “[i]n employing adverse inferences, one factor the [Department] will consider is the extent to which a party may benefit from its own lack of cooperation.” SAA at 870.

Section 776(c) of the Act provides that the Department shall, to the extent practicable, corroborate “secondary information” by reviewing independent sources reasonably at its disposal. The SAA, at 870, makes it clear that “secondary information” includes information from the petition in the LTFV investigation and information from a previous section 751 review of the subject merchandise. The SAA also provides that “corroborate” means simply that the Department will satisfy itself that the secondary information to be used has probative value. *Id.* As the Department noted in Tapered Roller Bearings and Parts Thereof, Finished and Unfinished, from Japan, and Tapered Roller Bearings, Four Inches or Less in Outside Diameter, and Components Thereof, from Japan; Preliminary Results of Antidumping Duty Administrative Reviews and Partial Termination of Administrative Reviews, 61 FR 57391, 57392 (November 6, 1996), to corroborate secondary information, the Department will, to the extent practicable, examine the reliability and relevance of the information used.

As part of the corroboration process, we examined the spectrum of rates in the proceeding. We note that the rate of 52.60 percent, the highest rate in the proceeding, was already corroborated in the prior administrative review. See Certain Carbon Steel Butt-Weld Pipe Fittings From Thailand; Final Results of the Antidumping Duty Administrative Review, 62 FR 40797 (July 30, 1997) (Review 1995-1996). Consequently, there is no need to examine again the reliability of this rate. For purposes of this administrative review, we have reviewed the petition and the administrative record, and found no reason to believe that the reliability of this information should be called into question.

With respect to the relevance aspect of corroboration, however, the Department will consider information reasonably at its disposal as to whether there are circumstances that would render a margin inappropriate. Where circumstances indicate that the selected margin is not appropriate as adverse facts available, the Department will disregard the selected margin and determine an appropriate margin (see, e.g., Fresh Cut Flowers from Mexico; Final Results of Antidumping Duty Administrative Review, 61 FR 6812, 6814 (February 22, 1996) (where the Department disregarded the highest margin as adverse facts available because the margin was unusually high since it was based on another company's uncharacteristic business expense)).

The highest margin in the history of this proceeding is 52.60 percent from the AD petition. We note that since LTFV investigation, TBC was subject to this rate (adjusted for the countervailing duty) until December 1999, when it received a new and lower cash deposit rate. See Certain Carbon Steel Butt-Weld Pipe Fittings From Thailand; Final Results of the Antidumping Duty Administrative Review, 64 FR 69487 (December 13, 1999). Consequently, for over seven years, TBC operated under a rate which closely approximates the rate of 52.60 percent. We also note that the same rate of 52.60 percent was applied as the facts available in the prior segment of this proceeding when another respondent failed to cooperate to the best of its ability and continues to be applicable to that company. See Review 1995-1996. In this review, there are no circumstances indicating that this margin is inappropriate as facts available. Therefore, for the reasons stated above, we find that the 52.60 percent rate is corroborated to the greatest extent practicable in accordance with section 776(c) of the Act.

Because we have determined that TBC has not acted to the best of its ability to comply with our requests for information, we recommend the application of 52.60 percent which was the highest rate from the AD petition in the LTFV investigation.

Comment 2: Indirect Selling Expense Ratio

TBC requests the Department to recalculate indirect selling expense ratio in order to exclude amounts paid by TBC's U.S. affiliate, Benkan America, Inc. (BAI), in legal fees related to the antidumping proceedings from total indirect selling expenses. The petitioner did not comment on this issue.

Department's Position:

Because we have applied total adverse facts available, as explained in Comment 1, we need not to address this issue. See SAA, at 892.

Comment 3: CEP Profit Ratio

TBC urges the Department to recalculate the CEP profit ratio. According to TBC, in the preliminary results, the Department calculated the CEP profit ratio based on BAI's 2000 financial figures. For the final results, TBC is asking to use both 2000 and 2001 financial figures in order to reflect better the POR which straddles both calendar years. The petitioner did not comment on this issue.

Department's Position:

Because we have applied total adverse facts available, as explained in Comment 1, we need not to address this issue. See SAA, at 892.

Recommendation

Based on our analysis of the comments received, we recommend adopting the positions described above. If these recommendations are accepted, we will publish the final results of review and the final weighted-average dumping margins in the Federal Register.

Agree _____

Disagree _____

Let's Discuss _____

Faryar Shirzad
Assistant Secretary
for Import Administration

Date